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Supreme Court, U.S.
FILED
NOV 9 1993
OFFICE OF THE CLERK

No. 93-356

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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MCI TELECOMMUNICATIONS CORPORATION,
*Petitioner,*

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY TO BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14 pp

## RULE 29.1 STATEMENT

Petitioner incorporates by reference the Rule 29.1 statement set forth in the Petition for Certiorari.

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## REPLY TO BRIEF IN OPPOSITION

1. The need for immediate plenary review is clear. Until overturned by the D.C. Circuit in 1992, permissive detariffing had served for ten years as a cornerstone of the FCC's efforts to improve service and lower prices for long-distance service. The United States agrees that the D.C. Circuit's judgment warrants review.[1] This plea has been joined by sophisticated telecommunications consumers like IBM,[2] and by leading industry associations representing carriers that are, as a result of permissive detariffing, now seeking to bring competition to local telephone markets dominated by the Bell Operating Com-

[1] *See* Petition for certiorari in No. 93-521.

[2] *See Brief Amicus Curiae* of International Business Machines Corporation (filed in Nos. 93-356, 93-521).

panies.[3] AT&T's long-distance competitors also uniformly support review because of "the overwhelming importance of this matter to the Nation's ongoing transition from monopoly to competitive telecommunications markets."[4] As these parties and *amici* have recognized, the D.C. Circuit's ruling will "radically alter the marketplace for telecommunications services and, in turn, handicap the competitiveness of businesses that depend on such services" by removing "an essential element of the highly successful, established regulatory policy on which important investment and business decisions have been based" for a decade.[5]

AT&T concedes as much. In particular, AT&T raises no challenge to the FCC's conclusion that competition constrains nondominant carriers from unreasonable or discriminatory pricing, and thereby acts as an efficient, welfare-enhancing substitute for burdensome regulation. Nor does AT&T contend that permissive detariffing has harmed the intended beneficiaries of tariff regulation—consumers. To the contrary, AT&T enthusiastically endorsed these conclusions in a recent FCC filing, and asked that the benefits of tariff deregulation be extended to it.[6] Even the

[3] *See* Joint Brief of Respondents Association for Local Telecommunications Services, *et al.* (filed in No. 93-521).

[4] Brief *Amici Curiae* of WilTel, Inc., LDDS Communications, Inc. d/b/a LDDS Metromedia Communications, Cable & Wireless Communications, Inc., Chadwick Telecommunications Corp., American Network Exchange, Inc., KLP, Inc. d/b/a Call America, Capital Network System, Inc., Impact Telecommunications Corp., LCI International, Inc., One-2-One Communications, Inc., and Telephone Electronics Corp. (filed in No. 93-521), at 3. *See also* Joint Brief of Respondents Association for Local Telecommunications Services, *et al.* (filed in No. 93-521) at 6 (D.C. Circuit invalidated "an agency policy of unquestioned soundness and central to the agency's goal of promoting competition").

[5] IBM *Amicus* Brief, at 10, 11.

[6] Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, filed September 22, 1993 in



D.C. Circuit did "not quarrel with the Commission's policy objectives." Pet. App. 54a. There is thus no dispute that the D.C. Circuit's ruling will shackle the FCC, the telecommunications industry, and the public to obsolete and burdensome tariff rules.

2. The D.C. Circuit's sole justification for imposing such a harmful and disruptive result—the conclusion that permissive detariffing is beyond the FCC's statutory authority under Section 203(b), *see* Pet. App. 54a—rests on a perfunctory statutory analysis that AT&T makes no serious effort to defend. Instead, AT&T spends page after page arguing that the D.C. Circuit's ruling was "compelled by this Court's decision three years ago in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)." *See* AT&T Opp. at 7. *Maislin*, however, has nothing to do with the question presented here.

a. *Maislin* did not arise under the Communications Act, but under the Interstate Commerce Act. The case

*Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, at 16-17:

> As the Commission recognized at the outset of this docket, and reaffirmed only months ago, carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably. The pricing of their services is effectively constrained by market forces: if such carriers sought to charge supracompetitive rates, or discriminate unreasonably, customers would simply move to other carriers; and carriers that attempt to charge prices below cost would generate losses that could never be recouped. . . .
>
> In these circumstances, no legitimate purpose is served by . . . subjecting AT&T to direct economic regulation. To the contrary, such regulation "imposes barriers and burdens [that] impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs," as the Commission has found. . . . Thus, direct economic regulation is not merely unnecessary; it impedes the "dynamism" of a competitive market and "impose[s] both direct and indirect costs on users." (quoting 6 FCC Rcd. at 5895).

did not involve the scope of the Interstate Commerce Commission's authority to promulgate rules modifying tariff filing requirements. Rather, *Maislin* involved the different question whether, absent any modification of the statutory tariff requirement, the ICC could retroactively excuse a carrier that had charged a rate other than a previously tariffed rate for the service at issue. The ICC made no claim in *Maislin* that its statutory modification authority justified retroactive approval of departures from previously tariffed rates. And the Court merely held—over a sharp dissent by Justice Stevens (joined by the Chief Justice)—that the ICC may not approve a carrier's departure from a rate it has previously filed for a particular service. Thus, *Maislin* in no way "compels" the D.C. Circuit's crabbed reading of Section 203 of the Communications Act.[7]

Even if *Maislin* had defined the scope of the ICC's delegated power to modify statutory tariff requirements, that decision would not diminish the need for plenary review in this case. Section 203 of the Communications Act is worded differently from its ICA counterpart in critical respects. *See* MCI Petition at 21-23. In particular, the "filed rate" requirements of the Communications Act—unlike their ICA counterparts in 49 U.S.C. § 10761—are expressly conditioned on the potential exercise of the Commission's authority to "modify any requirement" of Section 203.

The first clause of Section 203(c) states that "[n]o carrier, *unless otherwise provided by or under authority of this chapter*, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder." 47 U.S.C. § 203 (emphasis added). On its face, this language plainly contemplates

[7] It is telling that *Maislin*—which AT&T now claims "compelled" the result below—was mentioned only in passing in a footnote in the D.C. Circuit's analysis of Section 203. *See* Pet. App. 53a.



that service may be provided without filing schedules (tariffs) if the FCC "otherwise provide[s] . . . under authority of this chapter." The remaining provisions of Section 203, which prohibit particular departures from tariffed rates, each expressly refer back to the basic tariff requirement of the first sentence of Section 203(c).[8] Thus, the "filed rate" requirements of Section 203(c) are plainly *conditional*. They apply whenever the basic requirement of the first sentence of Section 203(c) applies. However, they do not apply if the FCC has "otherwise provided" for untariffed service pursuant to its Section 203(b)(2) powers.

Because the ICA counterpart of Section 203(c)—49 U.S.C. § 10761—is not similarly conditioned on the ICC's exercise of its modification power, Section 203 must be understood to authorize permissive detariffing irrespective of the scope of the ICC's authority. The "filed rate" doctrine on which AT&T places so much reliance is therefore different under the Communications Act. Given this critical distinction, the Court's ruling in *Maislin* cannot possibly obviate the need for review here.

[8] Section 203(c)(1) states that no carrier shall "charge, demand, collect or receive a greater or less or different compensation for such communication . . . between the points named in *any such schedule*." Section 203(c)(2) states that a carrier may not "refund or remit . . . any portion of the charges *so specified*." And Section 203(c)(3) states that a carrier may not "extend to any person any privileges or facilities in such communication . . . except as specified in *such schedule*." Each of the specific statutory components of Section 203(c)'s "filed rate" requirement thus proceeds expressly from the first sentence of Section 203. The "schedules" to which these provisions refer are the schedules required by the first sentence of Section 203(c). Because the first sentence contemplates that untariffed service may be provided in some instances "under authority of this chapter," the "filed rate" requirements of Section 203(c) are plainly conditional. They apply unless the FCC has otherwise authorized untariffed service pursuant to its Section 203(b)(2) powers.

b. Moreover, the *stare decisis* considerations that dictated the result in *Maislin* are wholly absent in this case. As AT&T notes, the *Maislin* Court held that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of a statute against our prior determination of the statute's meaning." 497 U.S. at 131. Because prior Supreme Court precedent interpreting the ICA had conclusively determined that motor carriers could not depart from previousiy filed rates, the ICC was not free in *Maislin* to advance a different reading of the filed rate requirement. This principle applied even though the precedent predated *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and thus did not analyze the issue according to the principles set forth in that decision.

This Court has never rendered similar binding interpretations of Section 203(b) of the Communications Act. For this reason, AT&T's *stare decisis* arguments are entirely beside the point. In fact, *stare decisis* considerations make immediate plenary review all the more important. Though not binding on this Court, the *stare decisis* effect of the decisions at issue here will constrain future D.C. Circuit panels interpreting the scope of the FCC's modification authority under Section 203(b). Because all FCC rules may be challenged in the D.C. Circuit, the rulings at issue here may well deter the FCC from even attempting innovative responses to changes in the telecommunications marketplace. *See* page 9 *infra*.

3. AT&T's limited textual analysis of Section 203 does not begin to address the arguments advanced in the petitions for certiorari. AT&T does not dispute that the ordinary meaning of the operative statutory phrase "modify any requirement" comfortably encompasses the power to authorize permissive detariffing. *See* MCI Petition at 16-17; U.S. Petition at 10-11. Instead, AT&T offers an *ipse dixit*. "In this context," AT&T claims, the word modify



"is 'defined as "[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce." ' " AT&T Opp. at 15 (quoting *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985) (quoting *Black's Law Dictionary* 95 (5th ed. 1979))). But AT&T makes no effort to explain why the word "modify" must "in this context" take the narrowest available dictionary definition, which the D.C. Circuit imposed, rather than the broader and more natural alternative definitions identified in the petitions for certiorari. AT&T likewise makes no effort to reconcile the D.C. Circuit's ruling with this Court's clear statement in *National R.R. Passenger Corp. v. Boston & Maine Corp.*, that the mere "existence of alternative dictionary definitions . . . each making some sense under the statute, itself indicates that the statute is open to interpretation," and thus that *Chevron* deference is mandatory. 112 S. Ct. 1394, 1402 (1992).[9]

Nor can AT&T reconcile its position with the language of Section 203(c)—a provision ignored by the D.C. Circuit in each of its rulings. As demonstrated, *see* page 5 & n.8 *supra*, Section 203(c) plainly contemplates that carriers can be authorized to provide service without filing a tariff. Thus, all available textual evidence indicates that Congress understood it was empowering the FCC to remove tariff requirements.

There is simply no basis for refusing to defer to the FCC in this case. It is implausible to argue that Congress has "directly addressed the precise question at issue." *Chevron*, 467 U.S. at 842-43; *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647-48 (1990). To the

[9] Recognizing the inherent ambiguity of the term "modify," this Court held in *Chemical Manufacturers' Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985), that EPA's construction of a provision of the Clean Water Act providing that the "Administrator may not modify any requirement of this section" was entitled to *Chevron* deference. 470 U.S. at 125-26.

contrary, Section 203(b) reflects an express congressional decision to delegate to the FCC the power to set tariff policy according to the FCC's view of the public interest. *See United States v. Morton*, 467 U.S. 822, 834 (1984) (deference particularly appropriate where "Congress explicitly delegated authority" to agency). The tariff issues involved here are highly technical and at the core of the agency's expertise. *Chevron*, 467 U.S. at 844; *Chemical Manufacturers*, 470 U.S. at 125; *NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 128 (1987). The delegation in Section 203(b) is consistent with the overall scheme of the Communications Act, which has long been recognized as "a supple instrument for the exercise of discretion by an expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). And Congress has ratified the FCC's permissive detariffing rule. *See* MCI Petition at 19-20.[10] For all these reasons, judicial deference should have been at its zenith. AT&T's suggestion that permissive detariffing requires present congressional approval is thus completely inappropriate.

4. There is no merit to AT&T's contention (AT&T Opp. at 14) that certiorari should be denied because the courts of appeals have given a uniform answer to the question presented. The D.C. Circuit is the only court of appeals to have considered that question. And, as demonstrated, the issue has never been fully considered under applicable law even in the D.C. Circuit. *See* MCI Petition at 16. The two Second Circuit decisions cited by

[10] AT&T's challenge to Congress's ratification of permissive detariffing is meritless. AT&T notes that TOCSIA was not intended to "alter" any obligations under other sections of the Communications Act. AT&T Opp. at 17-18. But petitioners do not contend that TOCSIA altered the scope of the FCC's Section 203(b) modification power. Rather, petitioners contend that the FCC's permissive detariffing rules, which were promulgated well before TOCSIA and were well known to Congress, constitute a *correct* interpretation of Section 203(b), and that Congress's action in TOCSIA signals agreement with the FCC's interpretation.



AT&T, *see* AT&T Opp. at 14, do not remotely raise the question presented here. In *AT&T v. FCC*, 572 F.2d 17, 25 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978), the Second Circuit affirmed the FCC's decision that it should not exempt "resellers" from *all* common carrier regulation. The FCC had not invoked Section 203(b), and the case raised no issue respecting the proper scope of the FCC's Section 203(b) modification power. In *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973), the Second Circuit held that Section 203(b) did not authorize the FCC to alter requirements independently imposed by Sections 204 and 205 of the Act. The case did not raise any question respecting the scope of the FCC's power to modify the tariff requirements of Section 203 itself.[11] Indeed, far from demonstrating uniformity, Second Circuit law squarely rejects the central premise of AT&T's brief in opposition. The Second Circuit has held that, in enacting Section 203(b), "the congressional intent was not to provide a carbon copy of the Interstate Commerce Act." *AT&T v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974).

5. Although AT&T suggests that plenary review is premature because AT&T's challenge to the FCC's *Range Tariff Order* is presently before the D.C. Circuit (AT&T Opp. at 20-22), the pendency of that case points up the need for immediate review in this case. The FCC expressly adopted the *Range Tariff Order* as a fallback, after the D.C. Circuit invalidated permissive detariffing in the rulings under review here. AT&T is presently challenging the *Range Tariff Order* on the ground that the very D.C. Circuit rulings at issue before this Court foreclose any argument that the *Range Tariff Order* is a permissible exercise of the FCC's Section 203(b) modification power. AT&T's argument makes clear that the rul-

[11] 487 F.2d at 879 ("Since Section 203(b) only permits modification of 'the requirements made by or under the authority of this section,' the Commission may not rely upon this section to circumvent the requirements of Sections 204 and 205 relating to the limitation of the suspension period and the prescription procedure.").

ings at issue in these petitions will constrain the D.C. Circuit's future rulings as to the legality of FCC tariffing policies, and are certain to inhibit the development of tariffing policies the FCC with good reason believes to be in the public interest.

Respectfully submitted,

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